Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1998

ROSELLA E. BURNS, *et al.*,

Petitioners,

vs.

STONE FOREST INDUSTRIES, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Section 5(a)(1)(A) of the Workers Adjustment and Retraining Notification Act, 29 U.S.C. § 2104(a)(1)(A), which provides that an employer who orders a plant closing or mass layoff in violation of the Act's sixty day notice requirement is "liable to each aggrieved employee . . . for . . . back pay for each day of violation," entitles an aggrieved employee to damages for each calendar day of the violation period or only for wages for each work day of the violation period.

LIST OF PARTIES

In addition to the parties named in the caption, the following are also petitioners: Timothy Ray Keener; Ted-Hyun Kim; Emil Martin; Belle Mcgovern; Brenda L. Miotke; Keith Miotke; William Parker; Lavern Rhodes; Orrin Savage; Larry Vetter.

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Rosella E. Burns, Timothy Ray Keener, Ted-Hyun Kim, Emil Martin, Belle McGovern, Brenda L. Miotke, Keith Miotke, William Parker, Lavern Rhodes, Orrin Savage, and Larry Vetter, on behalf of themselves and others similarly situated, hereby petition this Court to issue a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Burns v. Stone Forest Industries Inc.*, 147 F.3d 1182 (9th Cir. 1998).

OPINIONS BELOW

The Judgment of the United States Court of Appeals for the Ninth Circuit is reprinted in Petitioners' Appendix ("Pet. App."), at 1a. The Opinion of that court is reported at 147 F.3d 1182 (9th Cir. 1998), and is reprinted at Pet. App. at 2a. The Judgement of the district court is reprinted at Pet. App. 12a. The Order of the district court adopting the Magistrate Judge's Findings and Recommendations is reprinted at Pet. App. 13a. The Magistrate Judge's Findings and Recommendation is reprinted at Pet. App. 15a.

STATEMENT OF JURISDICTION

The Ninth Circuit issued its Order and Judgment on July 14, 1998. This Petition was filed within 90 days, thereby giving this Court jurisdiction to review pursuant to 28 U.S.C. § 1254(1) (1970).

STATUTORY PROVISIONS INVOLVED

The relevant portion of the Worker Adjustment and Retraining Notification Act ("WARN" or "the Act"), provides:

> (a) Civil Actions Against Employers
>
> (1) Any employer who orders a plant closing or mass layoff in violation of section 3 of this Act shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for —
>
> (A) back pay for *each day of violation* at a rate of compensation not less than the higher of —

> (i) the average regular rate received by such employee during the last 3 years of the employee's employment; or
>
> (ii) the final regular rate received by such employee;
>
> * * *
>
> Such liability shall be *calculated for the period of the violation, up to a maximum of 60 days*, but in no event for more than one-half of the number of days the employee was employed by the employer.

9 U.S.C. § 2104(a)(1) (1988) (emphasis added).

STATEMENT OF THE CASE

On September 26, 1994, Respondent Stone Forest Industries ("Stone Forest"), informed workers at its Albany, Oregon plywood mill that the facility would permanently close its doors two days later. Pet. App. at 16a. During the sixty day period following the closing, Respondent, in apparent recognition of its clear violation of the Act — a violation which the district court later confirmed — continued providing its employees coverage under their benefits plan and paid each employee, "on regular paydays," for each day he or she *would have worked during the sixty day period. Id.* at 16a, 21a-22a.

After the conclusion of the sixty day period, Petitioners timely filed a class action complaint, alleging that WARN's damages and enforcement provision, 29 U.S.C. § 2104, entitled them to damages equal to back pay and benefits for each *calendar day* of Respondent's violation of the Act's sixty day advance notice requirement. *Id.* at 15a-17a. Respondent thereafter moved for summary judgment, arguing, *inter alia*, that it complied with the Act's notice requirements by providing wages and benefits for each of the forty-two days of the violation period on which its employees would have otherwise worked. *Id.* at 15a-16a, and 22a. Petitioners' then cross-moved for partial summary judgment on the issue. *Id.* 15a-16a.

After finding that Respondent "clearly violated the notice provision" of the Act, Pet. App. at 21a-22a, the Magistrate Judge concluded that Respondent was entitled to summary judgment because its payment of 42 days wages and benefits offset its liability under the Act. Pet. App. at 31a-32a. The Magistrate Judge began by finding that the phrase " 'back pay for each day of the violation' was susceptible to more than one reasonable interpretation," *id.* at 24a-25a, and that the legislative history supported both the calendar and work day approach.[1] Faced with these conflicting findings, the Magistrate Judge held that, while both approaches "have merit . . . , the workday approach better reflects the [Act's] statutory purpose." *Id.* at 27a. After *de novo* review, the district court adopted the Magistrate Judge's Findings and Recommendation and granted Respondent's motion for summary judgment. *Id.* at 13a-14a.

Petitioners appealed to the United States Court of Appeals for the Ninth Circuit which affirmed the district court's decision. Specifically, the court of appeals, like the district court, found that the phrase "back pay for each day of the violation" was susceptible to interpretations that supported both the work day and calendar day approach to calculating damages under the Act. *Id.* at 7a. The court then turned to the legislative history, but found ambiguity there arising from a purported conflict between two oft-cited congressional reports.[2] Given this purported ambiguity in the legislative history, the court found that the "preferable way to resolve [the] linguistic ambiguity [of the Act was] to evaluate the alternative readings in light of the" Act's purpose.[3] *Id.* at 8a.

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1. " . . . Congress' attempts to clarify the damage provision remain susceptible to both interpretations." Pet. App. at 27a.

2. Senate Report, S. Rep. No. 62, 100th Congress, 1st Sess. 24 (1987), commenting on an earlier version of the Act, that supported the work day approach; and a later House Conference Report, H.R. Conf. Rep. No. 100-576, 100th Cong., 2nd Sess. 1052-1053 (1988), commenting on the final version of the Act, that supported the calendar day approach. Pet. App. at 26a-27a.

3. The Ninth Circuit's distinction between the "legislative history," on the one hand, and the "evaluat[ion] . . . in light of the purpose of the statute," Pet. App. at 8a, on the other, creates a false dichotomy. Regardless of the

(Cont'd)

Ignoring the significant non-compensatory and prophylactic purposes of the Act, the court found that WARN "is a wage workers' equivalent of business interruption insurance" *id.*, designed to provide "a two month uninterrupted income stream facilitating a job search." *Id.* at 9a.[4] Relying on this erroneous interpretation of the Act, the court held that employers who violate the Act are required only to pay aggrieved employees a *day's wages for each day during the violation period on which the employee would have worked. Id.* The court also concluded that it did "not make sense to require the company to pay [a worker] for calendar days without regard to work days, because the stream of income would be arbitrarily long for some workers and short for others." *Id.* This conclusion was based on damage calculations performed on a hypothetical scenario[5] which was soundly rejected by both the Secretary of Labor[6] and the Third Circuit,[7] but relied upon by three other circuit courts in adopting the work day approach.[8] *Id.*

(Cont'd)
apparent conflict between these two excerpts from the legislative history, the underlying purpose of the Act is fully understood *only* by examining the legislative history in its full context. See further discussion below, *infra*, at 14-17.

4. This analogy to "business interruption insurance" flies in the face of Congress' unequivocal rejection of a proposed amendment to the WARN Act introduced by Senator Quayle. The amendment would have allowed employers to comply with the Act by providing severance pay in lieu of notice. 134 Cong. Rec. 15,926 (1988). See further discussion of this proposed amendment, *infra*, at 17.

5. This hypothetical scenario depicts a situation whereby part-time workers, based on their daily rate of pay, would receive a higher damage award than would full time workers under the calendar day approach. The court's erroneous analytical reliance on this hypothetical is discussed in detail *infra*, at 20-22.

6. Amicus Brief Submitted by the Department of Labor at the request of this Court in *Carpenters Dist. Council v. Dillard Dept. Stores*, 15 F.3d 1275 (5th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995), at Pet. App. 34a-55a.

7. *United Steelworkers v. North Star Steel Co.*, 5 F.3d 39, 43, n.6, (3rd Cir. 1993).

8. *See Breedlove v. Earthgrains Baking Co.*, 140 F.3d 797, 800 (8th Cir.
(Cont'd)

The court also rejected the calendar day approach because it believed it would financially pressure a company "in a way that would hamper the workers' opportunities to search for new jobs." *Id.* at 9a-10a. Completely ignoring the broad statutory exceptions to liability under the Act for employers who are unable to provide the required advance notice, 29 U.S.C. § 2102(b), the court found that the calendar day approach would pressure employers into avoiding liability ". . . by requiring workers to come in every work day during the 60 day notice period, and tell them to sit and waste time in a plant that produced nothing." *Id.* at 9a.

REASONS FOR GRANTING THE WRIT

This case involves a conflict in statutory interpretation among six courts of appeals, several district courts, and the Secretary of Labor, whose interpretation of the statutory language in question, which was proffered at the request of this Court in *Carpenters Dist. Council v. Dillard Dep't. Stores,* 15 F.3d 1275 (5th Cir. 1994) *cert. denied,* 513 U.S. 1126 (1995), is directly at odds with that adopted by the Ninth Circuit here. The conflict turns on a significant and well defined issue of federal statutory interpretation that arises in every WARN case. It directly raises concerns about the inequitable treatment of aggrieved employees under the Act and uncertainty in the interpretation and application of various provisions of the Act. At bottom, the disagreement turns on the very purpose of the Act itself. The fundamental question is whether Congress intended the Act to ensure that workers receive timely notice of plant closings and mass layoffs to facilitate critical, geographically centralized government-assisted retraining and readjustment assistance, or whether the Act was merely meant to compensate dislocated workers by providing them with back pay in lieu of notice, placement assistance and retraining. The former interpretation is endorsed by the Third Circuit, the Congress that enacted WARN, and the Department of Labor (the "DOL"), which was charged with promulgating regulations under the Act. The latter interpretation is

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1998), *petition for writ of certiorari filed* July 6, 1998, Docket No. 98-77; *Saxion v. Titan-C-Mfg.*, 86 F.3d 553, 560 (6th Cir. 1996); and *Carpenters Dist. Council v. Dillard Dep't. Stores*, 15 F.3d 1275, 1285 (5th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995).

the result of the misguided readings of the Act by the Fifth, Sixth, Eighth, Ninth and Tenth Circuits, readings which the plain language, structure and purpose of the Act unambiguously reject, and which Congress, in passing the Act, also flatly rejected.

The need to resolve this conflict has never been more pressing. Just eight days after petitioners filed their petition for writ of *certiorari* seeking to challenge the Eighth Circuit's decision on the identical issue in *Breedlove v. Earthgrains Baking Companies, Inc., d/b/a/ Campbell Taggart Baking Company, Inc.*, 140 F.3d 797 (8th Cir. 1998), which petition is still pending before this Court (Docket No. 98-77, filed July 6, 1998), the Ninth Circuit handed down the decision that is the subject of this petition. The Ninth Circuit's decision is perhaps the most egregious decision on the issue to date in that it so fundamentally misconstrues the purpose of the Act that it will likely cause further misinterpretations of other provisions of the Act.

Due to the fact that: (i) the issue decided by the Ninth Circuit here and the Eighth Circuit in *Breedlove* is identical; (ii) Respondent in *Breedlove* relied heavily on the Ninth Circuit's decision here in challenging that petition; and (iii) the rationale supporting the identical conclusion in both cases differs in significant respects, Petitioners here and in *Breedlove* have contemporaneously filed herewith a joint motion under the *Burns* caption to consolidate the two writs for consideration by this Court. Finally, the arguments set forth below are also intended to serve as the Petitioners' Reply to the Respondent's Brief in Opposition in *Breedlove*.[9]

DISCUSSION

WARN provides, in pertinent part, that, "[a]ny employer who orders a plant closing [in violation of the Act] . . . shall be liable . . . for *back pay* for *each day* of violation. . . ." 29 U.S.C. § 2104(a)(1)(A) (1988) (emphasis added). The disagreement among the courts of appeals turns on whether Congress intended the term "back pay,"

9. Petitioners' Counsel of Record in *Breedlove*, the NLG/Maurice and Jane Sugar Law Center for Economic and Social Justice, are also Petitioners' Counsel of Record here. Counsel has filed a formal Reply in *Breedlove* contemporaneous herewith, which Reply refers this Court to particular portions of this petition.

read in conjunction with the phrase, "each day of violation," to be a label for the daily penalty rate designed to deter conduct that violates the Act, or whether Congress intended to limit aggrieved workers' remedy to purely compensatory relief for the loss of wages only. At the heart of this disagreement is whether WARN was intended to ensure advanced notice and centralized retraining and placement assistance to dislocated workers, or whether, as the Ninth Circuit erroneously held, it is merely the " 'wage workers' equivalent of business interruption insurance." Pet. App. at 8a.

Under the first approach, damages under the Act are just that: a penalty that redresses the wrong of denying workers advance notice and retraining and placement assistance that is assessed for each *calendar day* of the employer's violation of the Act. If, however, the Act is held to be merely a form of 'business interruption insurance,' as held by the Ninth Circuit, then the relief afforded to dislocated workers is simply compensation in the form of wages for each day of the violation *on which they would have worked.* Given a full sixty day violation of the Act, the calendar day calculation yields sixty days of damages, while the work day approach yields just forty-two — an approximate 30% disparity in recovery.

The Ninth Circuit has now joined four other circuits following the work day approach. *Breedlove v. Earthgrains Baking Co.*, 140 F.3d 797 (8th Cir. 1998), *petition for cert. filed*, July 6, 1998, Docket No. 98-77; *Saxion v. Titan-C-Mfg.*, 86 F.3d 553 (6th Cir. 1996); *Frymire v. Ampex Corp.*, 61 F.3d 757 (10th Cir. 1995), *cert. dismissed*, 517 U.S. 1182 (1996); *Carpenters Dist. Council v. Dillard Dep't. Stores*, 15 F.3d 1275 (5th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995). The Third Circuit, on the other hand, has adopted the calendar day approach, *United Steelworkers v. North Star Steel Co.*, 5 F.3d 39 (3rd Cir. 1993), *cert. denied*, 510 U.S. 1114 (1994), *reh'g denied*, 511 U.S. 1048 (1994), agreeing in full with the interpretation of the Act urged by the DOL, *see* Pet. App. at 34a-55a,[10] which was granted express authority in the Act to prescribe regulations thereunder. 29 U.S.C. § 2107.

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10. See *infra* 12-14, for a discussion of this Court's invitation to the DOL to submit an Amicus Brief in *Carpenters* on the proper interpretation of the Act, and the deference due to the DOL's interpretation as set forth in that brief.

The remaining seven courts of appeals will eventually have to choose between these conflicting interpretations of the Act and its purpose.[11] Not surprisingly, cases raising the issue still divide the lower courts. Compare: *Sinischalchi v. Shop-Rite Supermarkets, Inc.*, 903 F. Supp. 182 (D. Mass. 1995), and *United Electrical Workers v. Maxim, Inc.*, 5 IER Cases (BNA) 629 (D. Mass. 1990), which adopt the calendar day approach, with *Local 1239 v. Allsteel, Inc.*, 1998 W.L. 299820 (N.D. Ill., June 2, 1998); *Ass'n of Western Pulp and Paper Workers v. Grays Harbor Paper Co.*, No. C93-5226B, 1994 U.S. Dist. LEXIS 13094 (W.D. Wash. 1994); *Washington v. Aircap Indus.*, 860 F. Supp. 307 (D.S.C. 1994); and *Jones v. Kayser-Roth Hosiery, Inc.*, 748 F. Supp. 1292 (E.D. Tenn. 1990), *amended in part*, 753 F. Supp. 218 (E.D. Tenn. 1990), which endorse the work day computation.

A ruling by this Court will forestall undue hardships on employees and employers whose legal rights and obligations remain uncertain, promote consistent interpretation and application of an important federal statute, and avoid divisive and unnecessary litigation. Perhaps most importantly, as the DOL made clear: "Uniform application of the WARN Act is important if the Act is to fulfill its prophylactic purpose." Pet. App. at 43a. Thus, this petition for writ of *certiorari*, together with that in *Breedlove, supra,* should be granted.

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11. The fact that the conflict among the circuits is asymmetric has never barred review by this Court. In fact, this Court has granted *certiorari* in cases on the basis of an inter-circuit conflict involving 1 circuit disagreeing with 5 or more circuits. *See, e.g., Musick, Peeler & Garret v. Employers Insurance of Wausau*, 508 U.S. 286, 289 (1993) (5 to 1 split among circuits); *National Labor Relations Board v. Robbins Tire and Rubber Co.*, 437 U.S. 214, 219 & 219 at n. 5 (1978) (7 to 1 split among circuits). The fact that the opinions of the majority of circuits is also at odds with the DOL's own interpretation of the Act also compels review by this Court. *See infra* pp 12-18, 20-22.

I.

THE INTER-CIRCUIT CONFLICT UNDERMINES WARN'S NATIONAL POLICY AS ARTICULATED BY CONGRESS, THE STATUTORY SCHEME AND THE SECRETARY OF LABOR, AND FOSTERS INEQUITABLE TREATMENT OF PLAINTIFFS, MISGUIDED INTERPRETATIONS OF THE ACT, AND UNCERTAINTY FOR LITIGANTS

Passage of the WARN Act in 1988 was the end result of a protracted 15-year Congressional effort to enact a law requiring employers to provide advance notice to their workers of foreseeable and impending plant closings and mass layoffs.[12] The Act was Congress' response to the accelerating 'de-industrialization' of the American economy, the burgeoning numbers of dislocated workers in need of retraining and other assistance, and the devastating impact of plant closings and mass layoffs at the community level.[13] The legislature's intent was to craft a *national* policy to deal with the nationwide problem of plant closings and mass layoffs.[14] By promoting the inequitable treatment of plaintiffs in different circuits, the proliferation of misreadings of WARN and its purpose, and uncertainty for litigants in undecided circuits, the division among the courts of appeals frustrates Congress' attempt to create a uniform national plant closing and mass layoff policy.

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12. *See* Richard W. McHugh, *Fair Warning or Foul? An Analysis of the Worker Adjustment and Retraining Notification (WARN) Act in Practice*, 14 Berkeley J. Employment & Lab. L. 1, 5-13, 14-16 (1993); Jessica L. Stein, *The Worker Adjustment Retraining and Notification Act (WARN): What Is the Meaning Behind the Language?*, 19 Seton Hall Legis. J. 648, 648-658 (1995); Christopher P. Yost, *The Worker Adjustment and Retraining Notification Act of 1988: Advance Notice Required?*, 38 Cath. U.L. Rev. 675, 688-692 (1989).

13. *See* McHugh, *supra* at 3-10; Stein, *supra* at 648-655; Yost, *supra* at 675-682.

14. *Cf.* 134 Cong. Rec. S 8373 (daily ed. Jun. 22, 1988) (statement of Sen. Byrd), *reprinted in* 100TH CONG., LEGISLATIVE HISTORY OF THE WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT, 1988, at 180-182 (Comm. Print 1990); *see* McHugh, *supra* at 1-10, 13-16; Stein, *supra* at 648-658; Yost, *supra* at 675-82, 690-92.

A. The Split Among The Courts Of Appeals Subjects Plaintiffs To Inequitable Treatment.

An inter-circuit conflict is intolerable and ripe for review when it raises an important question of federal law and policy unsettled by this Court. *See* Sup. Ct. R. 10(c); Stewart A. Baker, *Symposium on Supreme Court Advocacy*, 33 Cath. U. L. Rev. 611 (1984). Conflicts resulting in the unfair distribution of benefits or penalties to litigants in different circuits implicate crucial concerns about federal law and policy. *Cf.* Judicial Improvements Act of 1990 § 302(a)(b), Pub. L. No. 101-650, 104 Stat. 5089 (1990) (authorizing study of unresolved inter-circuit conflicts and suggesting particular attention to splits conferring federal benefits on litigants in some circuits and not others); *see also* Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. Pitt. L. Rev. 693, 757 (1995). Ensuring that federal law is interpreted and applied consistently, and not in a manner that deprives some citizens of the intended benefits of a national policy, is one of this Court's traditional responsibilities. *Cf.* Sup. Ct. R. 10(a)(c).

To date, even among the five courts of appeals which have found in favor of the work day approach, there exists inconsistent interpretations of the national policy embodied in, and purpose of WARN. Compare, for example, *Carpenters Dist. Council v. Dillard Dep't. Stores*, 15 F.3d 1275, 1283-1285 (5th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995) (purpose of the Act is to provide workers with notice of impending employment loss or to compensate employees for wages they would have earned had proper notice been given), and *Breedlove v. Earthgrains Baking Co.*, 140 F.3d 797, 801 (8th Cir. 1998), *petition for cert. filed* July 6, 1998 (while compensatory in nature, the WARN Act is also quasi-punitive because violating employers must pay wages for work not performed). Now with the Ninth Circuit's ruling in this case, yet another layer is added to this interpretive thicket. The Ninth Circuit held, without reference to any supporting authority, that WARN's purpose is simply to provide terminated employees with two months of continued pay and benefits so that they can support themselves while seeking new employment. Pet. App. at 9a. The court thus rejected even the *Dillard* and *Breedlove* courts' modest fidelity to the Act's notice provision, and *sua sponte* converted WARN into

> . . . a *wage workers' equivalent of business interruption insurance* . . . [which] protects a worker from being told on payday that the plant is closing . . . though he has to buy groceries for his family . . . and make a mortgage payment the next week.

Id. at 8a (emphasis added). Thus, for the Ninth Circuit, the statutory purpose of the Act is to ". . . provid[e] a two-month un-interrupted income stream facilitating a job search." *Id.* at 9a. Nothing could be further from the express purpose of the Act.

The demonstrable inaccuracy of this interpretation aside (which is discussed more fully below), the Ninth Circuit's ruling is troubling simply because it represents yet another step away from *any* consistent reading of the Act among the courts of appeals.[15] In thus contributing to the interpretive divide separating the circuits, the Ninth Circuit has helped guarantee the confused development of the law.

Because the courts of appeals are unable to reach a consensus on the Congressional policy underlying the Act, successful plaintiffs in the Third Circuit recover approximately 30% more in damages than plaintiffs in the remaining decided circuits for a full, sixty day violation of WARN's notice provision. Thus, aggrieved employees in those circuits which have adopted the work day approach are denied a significant portion of a remedy elsewhere available under federal law merely because they were not employed, or able to bring suit in the Third Circuit. Perhaps more importantly, because the work day approach provides no real incentive for employers to comply with the Act (*see infra* p. 16), employees in these circuits are less likely to receive the advance notice and centralized retraining and placement assistance that was the very purpose of the Act. Thus, rather than fulfill what the DOL described as WARN's "prophylactic purpose,"

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15. The interpretive inconsistency is even more pronounced, of course, when considering *United Steelworkers v. North Star Steel Co.*, 5 F.3d 39, 42-44 (3rd Cir. 1993), *cert. denied*, 510 U.S. 1114 (1994), *reh'g denied*, 511 U.S. 1048 (1994) (plain language and scheme of WARN, together with canons of statutory construction, compel conclusion that recovery under WARN is damages and should be awarded for each calendar day of notice violation).

of ensuring advance notice, Pet. App. at 43a, the Act is reduced to the Ninth Circuit's vision of mere unemployment insurance. *Id.* at 8a.

The inter-circuit split thus results in the disparate, inequitable treatment of plaintiffs on grounds that are arbitrary and destructive of a sound public policy's commitment to uniformity and fairness in federal law. Unless the dispute is resolved by this Court, plaintiffs in different circuits will be treated inequitably.[16] Moreover, Congress' intention of creating a national mechanism for redressing the injuries visited upon dislocated workers who do not receive adequate notice of their impending loss of livelihood will be frustrated.

B. The Statutory Interpretation Of WARN By The Secretary of Labor Is Entitled to Substantial Deference By This Court.

In 1995, the plaintiffs in *Carpenters, supra,* filed a petition for a writ of *certiorari* challenging the Fifth Circuit's adoption of the work day approach. This Court, in considering that petition during a time when the only other appellate adjudication of this issue was from the Third Circuit (reflecting a split among only 2 circuits), requested that the Solicitor General's office submit an amicus brief on this issue, which it did in conjunction with the Secretary and Department of Labor. In that amicus brief, reprinted in full beginning at Pet. App. 34a, and hereinafter referred to as the "DOL Amicus Brief," the Secretary urged this Court to grant the petition, reverse the decision of the Fifth Circuit and adopt the calendar day approach.

For the reasons that follow, and because the question presented in *Carpenters* is identical to that presented here and in *Breedlove*, the Secretary of Labor's position on the interpretation of the Act's purpose

16. Given the broad language and scope of the Third Circuit's calendar day decision in *United Steelworkers v. North Star Steel Co.*, 5 F.3d 39 (3rd Cir. 1993), and the significant procedural and policy impediments to the reconsideration of the issue by that court, *see* U.S.C. Ct. App. 3rd Cir., Appx. 9.2, *et seq.* (1998), reversal of the Third Circuit's position is unlikely. Thus, a definitive ruling on the issue by this Court is the only way to eliminate the significant disparity in the amount of damages awarded in the different circuits and the forum shopping attendant thereto, and end the continued sluggish and inefficient procession of litigation on the issue through the judicial systems of the remaining undecided circuits.

and computation of damages provision, as set forth in DOL Amicus Brief, should be granted substantial deference by this Court.

In *Pauley v. Bethenergy Mines, Inc., et al.*, 501 U.S. 680 (1991), this Court held:

> Judicial deference to an agency's interpretation of ambiguous provisions of the statutes it is authorized to implement reflects a sensitivity to the proper roles of the political and judicial branches. * * * [T]he resolution of ambiguity in statutory text is often more a question of policy than law. *When Congress, through express delegation or the introduction of an interpretive gap in the statutory structure, has delegated policymaking authority to an administrative agency, the extent of judicial review of the agency's policy determinations is limited. It is precisely this recognition that informs our determination that deference to the Secretary is appropriate here.*

Id. at 696 (emphasis added) (citations omitted). *Cf. Gardebring v. Jenkins*, 485 U.S. 415, 429-430 (1988) (agency's interpretation of its own regulation is entitled to deference even when that interpretation had not been asserted prior to the lawsuit in question).

Similarly, WARN expressly delegates authority to the DOL to "prescribe such regulations as may be necessary to carry out this Act," 29 U.S.C. § 2107(a), which it did in 1989. *See* 20 C.F.R. § 639 *et seq.* Moreover, each court that has adopted the work day approach has done so because of purported ambiguities in the Act's statutory text, and has turned, albeit incorrectly, to the policy behind, and purpose of the Act for guidance.[17] Thus, if there is an 'interpretive gap' in the statutory

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17. Pet. App. at 8a-9a; *Breedlove v. Earthgrains Baking Co.*, 140 F.3d 797, 800, 801 (8th Cir. 1998), *petition for writ of certiorari filed* July 6, 1998, Docket No. 98-77; *Saxion v. Titan-C-Mfg.*, 86 F.3d 553, 560-61 (6th Cir. 1996); *Frymire v. Ampex Corp.*, 61 F.3d 757, 771-72 (10th Cir. 1995), *cert. dismissed*, 517 U.S. 1182 (1996); *Carpenters Dist. Council v. Dillard Dep't. Stores*, 15 F.3d 1275, 1283-85 (5th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995).

text as employers in each of these cases have argued, then, given that policymaking authority was delegated under the Act to the DOL, the holding in *Pauley* compels deference to the interpretation of the Act proffered by the DOL. Deference here is particularly appropriate given that the DOL Amicus Brief sets forth the Secretary's *position* on the interpretation of the phrase "back pay for each day of violation." DOL Amicus Brief at Pet. App. 49a, n. 8. Thus, the Secretary was not merely offering advice, but rather was taking a *position* that the DOL endorsed.[18] While particular statutory interpretations and recitations of the policy underlying WARN made by the Secretary are referred to below, the full weight and authority of the DOL Amicus Brief *in toto* should be considered, and granted deference to by this Court in considering this petition.

C. The Ninth Circuit Misconstrued The Purpose Of WARN.

As an initial matter, the Act, and the relief provided thereunder, must be construed according to its manifestly punitive and deterrent purpose.[19] The principle purpose of WARN is to provide affected employees, state dislocated workers units, local governmental entities, and, where applicable, union officials, with sixty days advance notice of a plant closing or mass layoff, in order to provide the best opportunity for the affected government units and unions to assist workers with readjustment assistance and re-employment while the business is still in operation.[20] Congress thought that this goal could

18. That the Secretary would have to formulate a position on statutory interpretation *after* the promulgation of the regulations under the Act is no surprise. Indeed, at the outset of the regulations, the DOL made it plain that the regulations were intended to establish "broad guidelines," and that it recognized that the regulations could not "address the multitude of industry and company specific situations in which advance notice will be given." 20 C.F.R. § 639.1(b).

19. "When interpreting a statute, the courts will not look merely to the particular clause in which the general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law." *Kokoska v. Belford*, 417 U.S. 642, 650, *reh'g denied*, 419 U.S. 886 (1974). *See also, United Food and Commercial Workers v. Brown*, 517 U.S. 544 (1996).

20. The main vehicle by which this is to be accomplished is the Economic Dislocation and Worker Adjustment Assistance Act ("EDWAA"), 29 U.S.C.

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not be realized unless workers had collective access to the facilities of a functioning operation. As the Act's sponsor Senator Metzenbaum explained:

> The important element in our bill is to *see to it that people have the time to seek readjustment and retraining while they are working. . . . We are not seeking to get workers paid because their plant is closing. . . .*

134 Cong. Rec. 15,928 (1988) (emphasis added). The utility of having the plant as a place for workers and state agencies to congregate and address the crisis of imminent job loss is what makes advance notice central. Quoting the Secretary of Labor's Task Force, Senator Metzenbaum stated:

> Advance notice is essential because notice facilitates greater participation [in retraining, counseling, and placement programs] and because a functioning plant is perhaps the programs' single most important resource.

Id. This statement of the fundamental goal of the Act was not mere speculation, but based on hard empirical data. Senator Metzenbaum expressly based his statement on a General Motors study demonstrating that, where a functioning plant is available for their use, 85% of employees to be terminated took part in retraining and adjustment programs. *Id.* Where there was no advanced notice and use of a centralized facility, only 15% of workers took part in such programs. *Id.* Congress, concerned about this striking disparity in participation, and determined to provide for effective retraining and placement programs, designed WARN to require the crucial advance notice — not pay for missed days of work in lieu of that notice. The very title of the Act itself, the Worker Adjustment and Retraining Notification Act, clearly articulates Congress' intent.

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§§ 1651-1662b (1988). EDWAA provides adjustment services to dislocated workers by linking state dislocated worker units, local governments, unions and employers. There is also an opportunity for employees to seek new employment, or retraining and income support through either the Trade Adjustment Assistance program, 19 U.S.C. §§ 2271-2322 (1975), or the NAFTA Transitional Adjustment Assistance program, 19 U.S.C § 2331 (1993).

The Ninth Circuit, as well as other courts that have adopted the work day approach that permits employers to willingly withhold advance notice, shut their doors and then pay "business interruption insurance" to their workers in lieu of notice, have effectively undermined this Congressional intent. The work day approach, in the end, only requires the violating employer to pay the same amount to its workers as it would have had proper notice been given. Thus, there is thus no real penalty for non-compliance and no incentive to comply. *Damages awarded under the work day approach also fail to redress the principal wrong visited upon employees: lack of advance notice and centralized retraining and placement assistance.*

The work day view of WARN Act damages as compensatory relief is also inconsistent with the recent description by this Court of WARN Act damages as "penalties."[21] Compensatory relief is not a penalty; it is a make-whole remedy. Dan B. Dobbs, The Law of Remedies, § 3.1 (1973). Damages as penalties are meant "to punish and to set an example that will deter similar conduct in the future." *Id.* at § 3.9. Only the calendar day method, which requires an employer who fails to give notice to employees to pay its employees for "each day" of the violation, provides employers with an incentive to comply with the Act by penalizing them for non-compliance.

The Ninth Circuit's holding inflicts even greater injury on Congress' aims than previous work day decisions because it completely ignores the fundamental purpose of the Act: to require employers to give advance notice to their employees of an impending plant closing or mass layoff. It also completely disregards the inextricable relationship between this notice requirement and the Congressional goal of centralized, pre-termination government-

21. "An employer who violates the notice provisions [of the Act] is liable *for penalties by way of a civil action. . . .*" *North Star Steel*, 515 U.S. 29, 31 (1995) (emphasis added). Respondent's contention in *Breedlove* that the penalties the Court referred to above was the 'civil action' itself is nonsensical. (Respondent's Brief in Opposition in *Breedlove v. Earthgrains Baking Co.*, 140 F.3d 797 (8th Cir. 1998), *petition for writ of certiorari filed* July 6, 1998, Docket No. 98-77, ("*Breedlove* Brief in Opposition"), at 14. The language cited makes clear that the Court was simply setting forth the statutory scheme of the Act, and that employers who violate the Act are liable for penalties assessed thereunder.

assisted retraining and placement assistance for dislocated workers. Instead of respecting Congress' intent, the Ninth Circuit erroneously decided that the legislature was primarily concerned with ". . . providing a two-month uninterrupted income stream" to workers in order to facilitate *their own personal search* for new employment. Pet. App. at 9a. It thus rewrote the law, transforming WARN into a mandatory severance package for the hourly worker — a construction of the Act that Congress itself emphatically rejected. During the legislative debate, Senator Quayle offered an amendment that would have allowed "60 days severance pay in lieu of notice."[22] Arguing against the amendment, which was ultimately rejected, Senator Metzenbaum stated that the Act:

> . . . is about *giving notice*. It is *not* a mandatory severance bill. . . . * * * As stated by the National Academy of Sciences, . . . it is the notice that is essential to successful worker adjustment programs.

134 Cong. Rec. at 15,928 (June 24, 1988).

The Ninth Circuit thus ignored the national plant closing and mass layoff policy crafted by Congress, and rendered yet another misguided interpretation of the purpose of, and policy underlying the Act on which courts will erroneously rely both in this context and in others.

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22. 134 Cong. Rec. 15,926 (June 24, 1988). The DOL noted the following peculiarity in the rejected Quayle amendment that, in and of itself, shows that Congress was not considering a work day calculation:

> Even the Quayle amendment would have provided that the severance pay would be in 'an amount equal to the employee's compensation as computed under section [5(a)(1)] multiplied by the number of days that the requisite notice was not given,' . . . a formulation that would have made back pay under the Act awardable for each calendar day of the violation, whether or not an aggrieved employee would have worked and earned wages.

DOL Amicus Brief at Pet. App. 47a, n. 7 (citations omitted).

D. The Inter-Circuit Conflict Promotes Uncertainty For Litigants In Undecided Circuits And Forum Shopping.

An inter-circuit conflict is intolerable and ripe for review when it is outcome-determinative or unfairly grants different benefits to, or imposes different penalties on, litigants in the various circuits in cases arising from similar facts. *Cf.* Judicial Improvements Act of 1990 § 302(a)(b), Pub. L. No. 101-650, 104 Stat. 5089 (1990) (authorizing study of unresolved inter-circuit conflicts, and suggesting particular attention to conflicts conferring federal benefits to litigants in some circuits, while denying those benefits to litigants in other circuits); Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. Pitt. L. Rev. 693, 757, 760 (1995). Moreover, forum shopping resulting from an inter-circuit conflict also compels review.

1. The Inter-Circuit Conflict is Outcome-Determinative and Promotes Abuse of the Act's Good Faith Exception.

The significantly varying damage awards resulting from the inter-circuit split are often 'outcome-determinative' for aggrieved employees in undecided circuits because the work day formula encourages WARN violators to preempt potential lawsuits by compensating terminated workers for work days in the violation period. By assuming work day liability, the violating employer provides itself with a plausible argument that it has fulfilled its statutory obligations, while hoping to placate aggrieved workers who might otherwise initiate litigation. As long as there is no definitive ruling on this issue, potential plaintiffs in undecided circuits will fall prey to this tactic because they will not be able to predict whether a successful lawsuit would result in a calendar day recovery. Faced with the daunting task of protracted litigation with no guarantee of success, cost-benefit analyses of WARN lawsuits by potential plaintiffs will frequently weigh heavily against risking their scarce financial resources for uncertain outcomes.

The outcome-determinative nature of this tactic is substantially more significant when one considers that the Act itself provides for a reduction or total elimination of damages *after a finding of liability*

where the employer can demonstrate that it reasonably believed that it was not violating the Act. 29 U.S.C. § 2104(a)(4). Thus, employers can rest assured that, even if litigation is pursued and the calendar day approach is adopted, the significant reduction or total elimination of damages assessed is likely because the employer can point to decisions adopting the work day approach to support its contention that it in good faith believed it was not violating the Act. *See, e.g., Frymire v. Ampex Corp.*, 61 F.3d 757, 769 (10th Cir. 1995) (remand to reduce liability based on good faith with instruction that court below should 'carefully consider' employer's pay in lieu of notice and circuit court's decision on the calendar day/work day issue), *cert. dismissed*, 517 U.S. 1182 (1996); Magistrate Judge's Findings and Recommendation at Pet. App. 32a, n. 8 (same).

2. *Forum Shopping.*

The DOL accurately summarized how, in light of the Act's liberal venue provision,[23] the inter-circuit conflict on this issue is ". . . an invitation to widespread forum shopping."

> For instance, an employee who is terminated as the result of a plant shut-down in Louisiana, without the notice required by the WARN Act, could bring suit in the more favorable Third Circuit if the employer happens to "transact[ ] business" in Pennsylvania, while one whose employer's only business is within Louisiana could not.

DOL Amicus Brief at Pet. App. 54a, n. 13. Review and determination of the issue by the Court is the only antidote to forum shopping, which, if more courts adopt the calendar day approach, will increasingly become more widespread.

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23. The venue provision, 29 U.S.C. § 2104(a)(5), allows suit in "any district in which the violation is alleged to have occurred, *or in which the employer transacts business*." (emphasis added).

II.

THE NINTH CIRCUIT'S DECISION WORSENS THE CONSEQUENCES OF THE INTER-CIRCUIT SPLIT BY ENCOURAGING FURTHER ERRONEOUS JUDICIAL INTERPRETATIONS OF WARN

In its decision, the Ninth Circuit makes three mistakes in statutory construction and interpretation that will exacerbate the deleterious consequences of the inter-circuit conflict by influencing other federal courts to stray from the Congressional intent evinced in WARN.

A. Anomalous Results Created by the Alternative Readings of the Act.

In an effort to support its holding, the Ninth Circuit perpetuates the fiction that workers with unorthodox or part-time schedules find themselves entitled to disproportionately large damage awards under a calendar day approach simply by virtue of their unusual working arrangements. This argument, first rejected by the Third Circuit in *United Steelworkers v. North Star Steel Co.*, 5 F.3d 39, 43, n.6 (3rd Cir. 1993), but later embraced in *Dillard*, 15 F.3d at 1284, *Saxion*, 86 F.3d at 559, and *Breedlove*, 140 F.3d at 800, postulates that a full-time employee working four 10-hour shifts a week will receive more WARN damages under a calendar day calculation than a fellow employee who works five 8-hour shifts per week. The calendar day approach, the Ninth Circuit erroneously reasoned, requires the first worker to be compensated for sixty days at ten hours a day, for a total of 600 hours of pay. The second worker, on the other hand, receives eight hours of pay per day for the sixty day period, yielding a total of only 480 hours compensation. The court concluded that this was an incurable anomaly that required the rejection of the calendar day approach. Pet. App. at 9a. This simply is not correct.

WARN requires that aggrieved employees receive:

> . . . *back pay for each day of violation* at a *rate of compensation* not less than the higher of . . . the *average regular rate* received by such employee during the last 3

> years of the employee's employment or . . . the final regular rate received by such employee.

29 U.S.C. § 2104(a)(1)(A)(1988). Contrary to the respondent's assertions in *Breedlove*, there is ample authority for the proposition that the term "regular rate" is in fact derived from the Fair Labor Standards Act ("FLSA"),[24] a proposition that, once understood, resolves the purported anomaly relied upon by the Ninth Circuit. Because of the clarity and concise nature of the Secretary of Labor's position on the definition of "regular rate" as derived from the FLSA, and its relationship to the calculation of damages under WARN, and because of the direct applicability of that position to the facts of this case, relevant portions of that position, set forth in full in the DOL Amicus Brief at Pet. App. 49a-51a, are recited here:

> The term "regular rate" derives from the [FLSA] of 1938, 29 U.S.C. 201 *et seq.*, and the compensation scheme embodied in subsections (i) and (ii) of Section 5(a)(1)(A) of [the Act] comes verbatim from Section 7(o)(4) of the FLSA, 29 U.S.C 207(o)(4).[25] * * * Under the FLSA, an employee's "regular rate" is used to determine the minimum amount of overtime pay to which the employee is entitled to for work in excess of 40 hours in a work week. *See* 29 U.S.C. 207(a). That rate includes all amounts paid to the employee, 29 U.S.C. 207(e), and is an "hourly rate" computed "by dividing (the employee's) total remuneration for employment . . . in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid." 29 C.F.R. 778.109.
>
> Although the WARN Act specifies the manner in which an employee's hourly rate is to be determined, it does not state the number of hours for which an employee should be credited in computing his damages for a given day.

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24. *Breedlove* Brief in Opposition at 20 - 21.

25. When promulgating the regulations under WARN, "the Secretary expressed his intent to 'rely on the definitions found in the FLSA.' 54 Fed. Reg. 16,049 (1989)." DOL Amicus Brief at Pet. App. 49a, n. 8.

> The court of appeals assumed that if the Act were read to entitle aggrieved employees to back pay for every calendar day of the violation, a worker's award for each day would be based upon the number of hours in that employee's regular shift. The court was concerned that that method of calculation would produce anomalous and unfair results, because an employee who had worked a ten hour shift one day per week would receive a higher WARN Act award than would an employee who had worked five eight-hour shifts per week.
>
> *The court of appeals erred, however, in assuming that, under a "calendar day" approach, a part-time employee's back pay award would be computed by reference to the number of hours in his typical shift. Rather, equitable treatment of full- and part-time workers is ensured by averaging each employee's weekly hours over the typical five-day work week.* Thus, a part-time employee who worked a ten-hour shift one day per week would receive daily damages at his or her hourly "regular" rate for two hours of work per day, while a full-time employee would receive daily damages at his or her hourly "regular" rate for eight hours of work per day. The amount owed to such employees would then be calculated by multiplying the daily damages by the number of calendar days in the violation period (minus any statutory reductions). Under that formulation, a part-time employee is entitled to daily damages proportionally lower than those to which a full-time employee is entitled, and all full time employees (*i.e.*, 40-hour-per-week) are treated equivalently regardless of their work schedules. * * * [26]. The court of appeals limitation of damages to days on which a particular employee would have worked is therefore unnecessary to prevent anomalous and inequitable treatment of employees who have different work schedules.

Id. (emphasis added) (footnotes omitted).[27]

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26. The formulation urged by the DOL is exactly the method used by Respondent Stone Forest to compute petitioners' WARN "pay." Pet. App. at 16a-17a.

27. In attempting to support the anomaly cited by the Eighth Circuit in *Breedlove*, and dismiss the argument made by Petitioners there, which mirrored

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In fact, contrary to the Ninth Circuit's analysis, it is the work day approach and not the calendar day approach that produces significant anomalous results in the reading of the Act. First, were a work day interpretation imposed consistently throughout the Act, an employer's obligations under the Act would be correspondingly expanded.[28] Second, the work day interpretation is inconsistent with the plain meaning of the seldom exercised civil enforcement provision of the Act, 29 U.S.C. § 2104(a)(3), which provides for a $500 a day civil fine payable to a local governmental authority for the employer's failure to notify it. The Conference Report provides that "the maximum penalty payable to a local government is $30,000."[29] H.R. Conf. Rep. No. 576, 100th Cong. 2d Sess. 1053, *reprinted in* 1988 U.S.C.C.A.N. 2086. Divided by $500 per day, the $30,000 results in sixty days of violation. As the Secretary of Labor stated:

> It is unlikely that the term 'each day' was intended to have different meanings and consequences in Sections 2104(a)(1)(A) and 2104(a)(3). See, *e.g., Commissioner v. Keystone Consol. Indus., Inc.*, 113 S.Ct. 2006, 2011 (1993) ("It is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.") (citations and internal quotation marks omitted).

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that made by the DOL cited above, Respondent in *Breedlove* attributed the following language to the Ninth Circuit's decision in *Burns* which appears nowhere in that decision: "Nothing in this definition suggests that the number of hours worked per week should be divided by the number of days in the work week to reach a per-day average." *Breedlove* Brief in Opposition, at 21.

28. For instance, the sixty days advanced notice required by the Act, 29 U.S.C. § 2102(a), would, given an average five day working week, be expanded to eighty-four days, an interpretation that employers, including Respondent, most assuredly would not urge. *See* DOL Amicus Brief at Pet. App. 44a, n. 3.

29. The Conference Report treats the civil fine provision and back pay award similarly, determining the amount owed by subtracting the days of notice actually given from sixty days. H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 1052 (1988).

DOL Amicus Brief at Pet. App. 45a (footnote omitted).[30] The anomaly here is that one sort of penalty, due the local government, is calculated by calendar days while the other, due the employees, is calculated by working days.[31]

Third, the workday calculation render superfluous the Act's "offset" provision. 29 U.S.C. § 2104(a)(2). That provision reduces an employer's liability by "any wages paid by the employer to the employee for the period of the violation," and by "any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation." *Id.* As the Third Circuit found, under the lost earnings concept of the work day approach, courts would automatically deduct any money paid in excess of lost wages from the damages, rendering the offset provision superfluous. *North Star Steel,* 5 F.3d at 42.

B. The Act Does Not Require Employers To Pay Employees To Perform No Work.

Yet another significant and clearly erroneous reading of the Act is the Ninth Circuit's conclusion that the ". . . calendar day

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30. Respondent's contention in *Breedlove* that the civil penalty provision for local governments "is neither applicable or relevant to the calculation of back pay" (*Breedlove* Brief in Opposition at 17) overlooks critical legislative history. As the Secretary of Labor points out, the following passage from a House Conference Report "makes clear that (1) back pay and civil fines are to be awarded for the same number of days, and (2) that number is to be determined by subtracting from 60 the number of days for which notice was given." DOL Amicus Brief at Pet. App. 45a, n. 5.

> [I]f the employer provides 20 days notice, then the maximum violation period for purposes of calculating back pay awards or civil fines would be 40 days. ('Violation period' refers to the period of time after a shutdown or layoff in violation of this Act, and extends for the number of days that notice was required but not given.). H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 1052 (1988).

31. Precedent on the calculation of damages due to local governments is scant, and, given the adoption of the work day approach in the Ninth and other circuits, it is very likely that the calculation of such dat ages will be the subject of future litigation.

construction would put financial pressure on the company to reduce expenses in a way that would hamper the workers' opportunities to search for new jobs." Pet. App. at 9a-10a. The court reasoned that a calendar day interpretation of the Act would put financial pressure on companies to keep their workers reporting to idle factories, instead of looking for new jobs, simply to avoid calendar day liability for violation of WARN's notice requirement. *Id.* The court found this result "irrational" and at odds with Congressional intent, because it would make a shutdown ". . . more painful, by discouraging employers from letting workers use the 60-day notice period to search for new jobs." *Id.*

However, it is the court of appeals' analysis which is at odds with Congressional intent. As explained above, the Act requires notice to be given sixty days *before* the intended shutdown, *not*, as suggested by the lower court, *on* the date of the intended shutdown thereby requiring the employer to keep the plant open for an additional sixty days. Moreover, employers who cannot give advanced notice for reasons beyond their control or for legitimate business reasons, are expressly excused from the Act's notice requirements under three critical provisions of the Act which the Ninth Circuit inexplicably overlooked. These provisions, discussed immediately below, make it clear that the *law-abiding* employer never needs to pay workers to "come in every work day during the 60 day notice period" and do nothing. Pet. App. at 9a.

WARN expressly excuses employers from the advance notice requirement under what have come to be known as the "faltering business," "unforeseen business circumstances," and "natural disaster" exceptions. 29 U.S.C. § 2102(b). In short, sixty days notice *is not required* where: (i) an employer is actively pursuing business or capital which, if obtained, would avoid or postpone the shutdown and the employer reasonably believes that giving notice would preclude the obtainment of the new business or capital; (ii) the mass layoff or plant closing is caused by circumstances not reasonably foreseeable at the time notice would have been required; or (iii) where the plant closing or mass layoff is due to a natural disaster.[32] 29 U.S.C.

32. Under these exceptions the employer is required to give its employees as much notice as is practicable when it learns that the covered shutdown or mass layoff will take place. 29 U.S.C. § 2102(b)(3).

§ 2102(b)(1) & (2). Thus, any time an employer is prohibited from giving the required notice by circumstances within any one of these three broad exceptions, it is exempted from liability under the Act. Otherwise, the express terms of the Act, as emphasized repeatedly within the legislative history, require simply that *while the employer is still operating its business*, at least sixty days prior to its intended closing, shutdown or mass layoff, the workers are entitled to notice. Therefore, contrary to the "idle hands" imaginations of the Ninth Circuit, in no way does the Act *ever* require the law-abiding employer to pay its workers to do nothing.[33]

C. Misapplication of the Cannons of Statutory Construction

Additionally, the Ninth Circuit's selective use of the cannons of statutory construction in construing the term "back pay" to support its work day position is untenable. As the Ninth Circuit noted, it may well be the case that, ". . . 'back pay' for employees has traditionally been understood to mean 'a sum equal to what they normally would have earned' had the violation not occurred," Pet. App. at 10a, and that words that have been assigned a well-defined meaning by the courts are generally presumed to have that meaning in subsequently enacted statutes. What the court selectively ignored is that the meaning of a word in a statute should *first* be determined from the *context* in which it is used. *Deal v. United States,* 508 U.S. 129, 131 (1993). Its failure to follow this cannon of statutory construction sets bad precedent for other courts considering this and other questions of statutory construction.

Like the Eighth Circuit in *Breedlove*, 140 F.3d at 800, the Ninth Circuit inexplicably and summarily severed the term "back pay" from its context in the phrase "back pay *for each day of violation.*" As the district court in *Dillard* reasoned:

> There is no rational explanation for inclusion in the Act of the phrase 'for each day of violation' if Congress

33. The Respondent in *Breedlove* makes a similar "idle hands" argument to support the notion that, despite a work day computation, the Act is still punitive in nature because an employer must pay for work not performed. *Breedlove* Brief in Opposition at 14. For the reasons stated above, that argument is devoid of merit.

> intended to limit an employee's recovery only to wages he would have earned during the period of the violation.

Carpenters Dist. Council v. Dillard Dep't. Stores, 778 F. Supp. 297, 309 (E.D. La. 1991). Congress' inclusion of this phrase must be assumed to have had a purpose.[34] As the DOL aptly concluded:

> [r]ead in the context of the Act as a whole, it is clear that "each day" can only mean "each calendar day," not "each work day." The Act operates according to calendar days, and makes no reference at all to work days. * * * Moreover, the concluding sentence of 29 U.S.C. 2104(a)(1), which follows the specification of the manner in which compensation for "each day of violation" is to be calculated, states that the employer's liability shall be calculated "for the period of the violation," up to a maximum of 60 days, but in no event more than one-half the number of days for which the employee was employed by the employer. Thus, under the Act, the term "period of the violation" identifies the time frame for which the employer is liable. The amount of compensation, however, is calculated for "each day" of that period at the specified "rate of compensation."

DOL Amicus Brief at Pet. App. 44a (citations omitted). Had Congress intended purely compensatory relief to aggrieved workers and

34. The Ninth Circuit's disregard of this phrase is not unlike a problem faced just two years ago in another WARN Act case. In *United Food and Commercial Workers v. Brown*, 517 U.S. 544 (1996), the employer asked this Court to conclude that WARN's provision for suits by unions was attributable only to congressional inadvertence. There, this Court said that

> [t]he argument for Brown Shoe's preferred construction simply rests on one speculative possibility in opposing a straightforward reading of the provision that a union may bring suit on behalf of its members. . . . Speculation loses, for the more natural reading of the statute's text, which would give effect to all of its provisions, always prevails over a mere suggestion to disregard or ignore duly enacted law as legislative oversight.

Id. at 550.

calendar day penalties to governmental units, it would have used *different* terminology. For example, it could easily have required "back pay" for each "working day" of the violation. It did not, and it cannot be presumed that the Congress inserted "idle," "meaningless," or "superfluous" verbiage into the statute. 82 C.J.S. *Statutes* § 316 (1953). The plain language of the statute must be adhered to.

CONCLUSION

For the reasons stated above, this Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit, as well as the Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Eighth Circuit in *Breedlove v. Earthgrains,* should be granted.

Respectfully submitted,

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